U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: APR 0 3 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision. Because the record, as it now stands, does not support approval of the petition, the AAO will remand the petition to the director for further consideration and action.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a research and development engineer at , Connecticut. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of background materials, some of them previously submitted.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on March 6, 2012. In an accompanying statement, counsel stated:

> [The petitioner] has made exceptional contributions to the field of physics, with emphasis in advancement of next generation materials such as thermoelectric materials and nanomaterials and high-technology applications. . . .

> Among [the petitioner's] most impressive achievements is the development of more efficient thermoelectric materials. High quality thermoelectric materials should be excellent conductors of electricity but poor conductors of heat, a combination of properties that is exceedingly rare. Finding or creating new materials with good thermoelectric properties is one of the primary objectives of the field. [The petitioner] has been a leading researcher in this highly important drive to find new thermoelectric materials. [The petitioner] was one of the original researchers to prove "grain boundary engineering" separates electrical and thermal conductivities for thermoelectric materials. . . .
>
> [The petitioner's] important scientific contributions have not been confined to thermoelectrics. His work also has been important in nanomaterials through his original investigations of the transport properties of carbon nanotubes. Carbon nanotubes are particularly well known for their excellent thermal conductivity. However, an important obstacle to their widespread use has been that they greatly lose their effectiveness when aggregated into groups. In an attempt to mitigate this loss of effectiveness, [the petitioner] developed a technique where carbon nanotubes were pre-aligned and then stacked before being compressed in a vacuum using spark plasma sintering. As a result, [the petitioner] was able to achieve carbon nanotube aggregates that outperformed samples made using previous methods by about 10 times, an incredibly significant result. . . .
>
> All of these achievements prove [the petitioner] is destined to make great contributions to his field in the future. . . .
>
> In recognition of his expertise, he has been published in internationally circulated journals and conference proceedings, which have been cited at least 111 times thus far. . . .
>
> His distinguished record of experience in the field is vital to future significant discoveries.

Database printouts in the record confirm counsel's claim of 111 citations of the petitioner's published work.

The petitioner's initial submission included five witness letters. In one of those letters, [redacted] of [redacted], whose research involves carbon nanotubes, stated that the petitioner "creatively developed a novel method for fabrication of 3-D bulk samples in which the original directions of carbon nanotubes were largely retained and the crystallinities were also improved," resulting in a tenfold increase in thermal conductivity. Prof. [redacted] asserted that the petitioner's "influential discovery kindles the light of hope that carbon

nanotubes could be used in bulk applications." stated that he had "extensively referenced [the petitioner's] paper" in his own recent publications.

The director issued a request for evidence on July 27, 2012, stating that the petitioner had not provided sufficient evidence to show that his work has had particular influence on his field. The director instructed the petitioner to "submit evidence to establish that *the beneficiary's past record* justifies projections of future benefit to the nation" (director's emphasis). The director specified that such evidence could take the form of "[e]vidence of citations to the beneficiary's work."

In response, the petitioner submitted, in counsel's words, "[e]vidence of at least 137 citations (91 of which are independent) to [the petitioner's] work" (counsel's emphasis). Counsel observed that the citations came from researchers on four continents, and counsel maintained that the petitioner's "citation record exceeds that of average researchers in his field."

The petitioner submitted a table of "Average Citation Rates for papers published by field, 2002 – 2012" from Thomson Reuters' ISI Web of Knowledge, printed May 8, 2012. The "Physics" entry included the following figures, showing the average citation rates for papers published in the years indicated:

2008 6.01 2009 5.08 2010 2.97 2011 0.83 2012 0.08

Counsel stated that the citation rate of the petitioner's papers – sometimes exceeding a dozen citations per paper – well exceeds the above numbers, establishing the significance and impact of the petitioner's work.

The director, in denying the petition on November 19, 2012, acknowledged the petitioner's evidence but stated that the citation data "is limited to Thomson Scientific indexed journal articles. Books, book chapters, or articles published in journals not indexed by Thomson Scientific are not taken into account. . . . As such, this information does not show that the beneficiary's original work has influenced the field." The director also stated that the witness letters did not "articulate any specific examples of how the beneficiary's work has already impacted the field."

On appeal, counsel protests that witnesses such as had indeed identified specific applications of the petitioner's work, and that the petitioner had provided ample evidence to show that his published work had attracted a significantly high number of citations. Counsel also submitted evidence showing that Thomson Reuters provides "comprehensive coverage of the world's most important and influential journals," including "over 12,000 top tier international and regional journals."

The director's denial of the petition rested largely on the narrow proposition that the petitioner had provided insufficient context for the citation data submitted. This conclusion does not withstand scrutiny; the record indicates that the petitioner's published work has attracted significant international attention as shown by their citation history, well past 100 and growing. The witness

letters are consistent with this documented evidence, and as such the letters play a credible supporting role. For these reasons, the director's decision, as stated, cannot stand.

Nevertheless, the petitioner must address an important issue before USCIS can properly approve the petition and waiver application. The purpose of the waiver is to secure prospective (future) benefit for the United States. The waiver is not simply a reward for past work. Rather, USCIS looks at the impact of the petitioner's past work as a guide to what one could reasonably expect from the petitioner in the future.

All of the witness letters in the record date from June and July of 2011, eight to nine months before the petition's March 2012 filing date. When the witnesses wrote their letters, the petitioner worked at [redacted] Massachusetts. For the most part, the witnesses discussed the petitioner's graduate studies at [redacted] South Carolina. Every published article by the petitioner identified [redacted] as the petitioner's institutional affiliation. Also, every article names [redacted] who supervised the petitioner's doctoral studies, as a co-author. The record, therefore, does not show that the petitioner has produced new research for publication since leaving [redacted]. Articles published after the petitioner left [redacted] appear to be based on work that the petitioner had previously performed at that university.

Since leaving [redacted] in 2009, the petitioner has worked for four different employers, but appears to have ceased to publish new research. Therefore, his production of highly-cited work while a doctoral student at [redacted] is not a reliable gauge of his continuing impact on the field.

The petitioner himself, on Form ETA-750B, Statement of Qualifications of Alien, provided this description of his duties at [redacted] "Develop and research technology based solutions that advance the science and application of generating, controlling, and utilizing energy beams. Please see petition letter." It is not clear what the petitioner meant by "petition letter." Counsel's initial statement contained little information about the petitioner's current work at [redacted], except for the assertion that "his focus is on development of electron and ion beam applications for nanotechnology, biological, and materials research." Counsel claimed a "need for [the petitioner's] continued participation in his current work," but did not provide any details about that "current work."

In a brief letter intended to verify the petitioner's ongoing employment (as opposed to the more detailed witness letters discussed previously), [redacted] president and CEO of [redacted] stated that the petitioner "is engaged in the development and delivery of technology based solutions that advance the science and application of generating, controlling and utilizing energy beams. His work is across a broad range of high technology applications." Like the petitioner's own statement on Form ETA-750B, Mr. [redacted] letter provided minimal information about the specific nature of the petitioner's work.

The witness letters predate the petitioner's employment at [redacted] and those that mentioned the petitioner's post-student work at all focused on the petitioner's then-current work at [redacted], founder, chairman and chief executive officer (CEO) of [redacted]

stated that his company "developed the prototype of ' in 2001, after a bioterrorist mailed anthrax pathogens to several victims. Mr. stated:

> [The petitioner] has worked at since September 2010. I was, however, aware of his work in the area of thermal science, physics, and materials engineering through his publications even before I recruited him to join our company. Having read of [the petitioner's] previous work experiences and unprecedented scientific contributions in both fundamental physics and thermodynamics as well as his more recent infrared technology research . . . . I offered him a permanent position as Thermal Research Scientist at to conduct the fundamental research investigations for
>
> He has played a major role on our research team since joining, and his expertise has enabled us to make significant advances in thermal dynamic issues.

The petitioner left about three months after Mr. wrote his letter, and therefore his employment with that company offers no prospective benefit to the United States. The petitioner arrived at in January 2012 after three months at but the initial submission contains little information about the petitioner's work at either company, or about his earlier postdoctoral training at from 2009 to 2010.

Furthermore, there is serious doubt about the national benefit that arose from the petitioner's work at . Certainly the sterilization of hazardous pathogens sent through the mail is a meritorious goal, but there are significant credibility issues regarding the extent to which served that goal. Under the USCIS regulation at 8 C.F.R. § 103.2(b)(16)(i), USCIS cannot base the outcome of a final decision without prior notice to the petitioner, but the present notice is not a final decision on the outcome of the petition. By mentioning this information in the present remand order, the AAO effectively serves notice that USCIS may consider such information in any future decision in this proceeding.

A press release from the U.S. Securities and Exchange Commission reads, in part:

> On September 10, 2012, the Securities and Exchange Commission filed an enforcement action in federal court in Boston charging Massachusetts-based and others for their roles in a fraudulent offering of unregistered securities. The defendants are charged with defrauding investors through various misrepresentations and schemes while raising at least $26 million in investor funds. . . .
>
> According to the Commission's complaint, filed in the United States District Court for the District of Massachusetts, , which purports to develop, manufacture and sell a machine for combating the use of dangerous biological agents through the mails, and its principals began engaging in unregistered offers and sales

> of securities to investors in the United States by at least 2004 and, after attracting the attention of various domestic state regulators in 2008, began utilizing "boiler room" firms to assist in selling shares of securities to overseas investors primarily in the United Kingdom. . . .
>
> The Commission's complaint further alleges that, as began raising money overseas in August 2008, the defendants transformed the company into a deceptive and fraudulent device designed to enrich its principals while also paying as much as 75% of investor proceeds as commissions to its overseas boiler room fundraisers. From August 2008 through approximately July 2010, most substantial source of cash generation and most significant expense was not manufacturing and selling machines, but instead was its securities promotion and sales activities.

On page 29 of the complaint mentioned above, the Commission stated: "In its ten year history, has sold fewer than ten machines."[1] The Commission named as a defendant, but did not name the petitioner as a defendant. There is no evidence, and the AAO does not allege, that the petitioner participated or was in any way aware of the violations alleged in the Commission's complaint. Nevertheless, the complaint is directly relevant because, apart from the petitioner's now-completed student work, the record focuses on the petitioner's work at to illustrate the petitioner's ongoing contributions to the national interest. If, as alleged, the company sold "fewer than ten machines" to disinfect mail, then the scope of the company's impact (and therefore that of its employees) is greatly limited.

Promotional materials on own web site offer the following description of the company:

> We design, manufacture and sell quality products that support the sciences, including histology, light microscopy, electron microscopy, materials science and products for the production, control and application of electron beam technology.
>
> offers vented laboratory microwave ovens for light and electron microscopy and histology specimen preparation. Our microwaves are available with a options [*sic*] for applications from basic tissue staining with air agitation to tissue processing or fixation procedures that require precise temperature control.
>
> For over 40 years, has specialized in manufacturing Filaments, apertures and many other components for Electron Beam applications. In addition to our standard offerings for Electron Microscopy and E-Beam Welding, we also provide many

[1] The press release is available at The full complaint is available at The AAO added printouts of both documents to the record on March 7, 2013.

OEMs with specialty filaments for applications like Vacuum Deposition, Ion Implant and X-Ray, just to name a few.[2]

From the above description, it is not evident how the achievements described at length in counsel's introductory statement and in the witness letters relate to the petitioner's work at .

Because the record is virtually silent regarding the petitioner's work for employers other than the AAO cannot consider the impressive citation rate of his student work to be the final or definitive word on his ongoing impact and influence on his field. In the absence of new published research, the petitioner must identify some other means by which he continues to influence his field to an extent that would warrant approval of the national interest waiver.

On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States. Nevertheless, the director's decision rests on a flawed reading of the evidence and, therefore, cannot stand. Additional evidence of eligibility may exist, but the petitioner has not submitted it for consideration.

Therefore, the AAO will remand the petition for a new decision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The record, however, does not currently establish that the petition is approvable. The AAO therefore remands the petition to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, the director must certify to the AAO for review.

[2] Source: (printout added to record March 7, 2013).